

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MALPHINE FOGEL,

Plaintiff,

vs.

ANTONY BLINKEN, UNITED STATES
SECRETARY OF STATE; UNITED STATES
DEPARTMENT OF STATE

Defendants.

Civil Action No. _____

ELECTRONICALLY FILED

JURY TRIAL DEMANDED

COMPLAINT

Plaintiff Malphine Fogel, by and through her undersigned counsel, files the following Complaint against Defendants Antony Blinken, United States Secretary of State (“Secretary Blinken”), and the United States Department of State, stating as follows:

INTRODUCTION

1. On August 14, 2021, Marc Fogel travelled from his home in Pennsylvania to Moscow, Russia to begin his final year of teaching American history to high-school students at the Anglo-American School of Moscow (“AAS Moscow”).

2. Marc Fogel was 60 years old, and his health was failing; he suffered pain from three back surgeries, knee surgeries, a rotator cuff surgery, and a hip replacement. He was prescribed medical marijuana for his pain.

3. Upon his arrival at Sheremetyevo Airport on August 14, 2021, Marc Fogel was arrested by Russian authorities for possessing less than an ounce of medical marijuana.

4. Marc Fogel was subsequently sentenced to an exorbitant fourteen years in a Russian

maximum security penal colony—for no other reason than because Marc Fogel is an American.

5. Marc Fogel’s arrest and sentencing were part of Russia’s scheme to close AAS Moscow and provide Russia with leverage in future prisoner exchange negotiations with the United States.

6. The Robert Levinson Hostage Recovery and Hostage-Taking Accountability Act, 22 U.S.C. §§ 1741 – 1741f (the “Levinson Act”), establishes procedures to address the wrongful detainment of United States nationals abroad (the “Wrongfully Detained”), including coordinating diplomatic engagements in support of efforts to recover the Wrongfully Detained. The Levinson Act establishes the Special Presidential Envoy for Hostage Affairs (“SPEHA”) to, *inter alia*, coordinate the diplomatic engagements required to recover wrongfully detained United States nationals and communicate consistent and accurate information to their family members. *See* 22 U.S.C. § 1741a.

7. Malphine Fogel is Marc Fogel’s 95-year-old mother and his family member as that term is defined under the Levinson Act. 22 U.S.C. § 1741(d)(8).

8. Secretary Blinken has not designated Marc Fogel as Wrongfully Detained under the Levinson Act.

9. Since his arrest and politically motivated sentencing, Marc Fogel has survived the harsh conditions of a maximum-security Russian penal colony while (i) Brittney Griner was convicted in Russia on identical charges as Marc Fogel’s (articles 228 and 229.1)¹ and returned home to the United States in exchange for Viktor Bout, a Russian arms dealer; (ii) Trevor Reed was exchanged for Konstantin Yaroshenko, a large-scale drug smuggler; and (iii) the United States

¹ Brittney Griner and Marc Fogel were charged and convicted under Articles 228 and 229.1 of the Russian Criminal Code. Article 228 concerns the illegal acquisition, storage, transportation, making or processing of narcotic drugs. Article 229.1 concerns the smuggling of narcotic agents across the borders of the Russian Federation.

government has negotiated for the return of Paul Whelan and Evan Gershkovich. Despite their similar (and, in the case of Brittney Griner, nearly identical) situations, the United States designated each of those United States nationals as Wrongfully Detained under the Levinson Act while denying equal treatment to Marc Fogel.

10. In this action, Malphine Fogel seeks to, *inter alia*, require Secretary Blinken to fulfill his statutory and constitutional obligation to review Marc Fogel's case and to designate him as Wrongfully Detained under the Levinson Act, just as Secretary Blinken has done for similarly situated United States nationals.

PARTIES

11. Plaintiff Malphine Fogel is Marc Fogel's 95-year-old mother who resides in Butler, Pennsylvania.

12. Defendant Secretary Blinken is the United States Secretary of State, in which capacity he has responsibility for reviewing the cases of United States nationals detained abroad to determine if there is ***credible information*** that they have been wrongfully detained, and upon determining that there is ***credible information*** that the detention of a United States national abroad is unlawful or wrongful, the responsibility to transfer the case from the Bureau of Consular Affairs of the Department of State to SPEHA. Defendant Secretary Blinken is sued in his official and personal capacities.

13. Defendant United States Department of State is an authority of the Government of the United States, established under 22 U.S.C. § 2651, that operates under the direction of the Secretary of State.

JURISDICTION AND VENUE

14. Subject matter jurisdiction is proper because this action is brought pursuant to

5 U.S.C. § 702; 28 U.S.C. § 1361; and 28 U.S.C. § 1346(b)(1); and asserts, *inter alia*, a constitutional claim under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

15. Venue is proper under 28 U.S.C. § 1391(e)(1) because this is a civil action in which the defendants are an officer of the United States acting in his official capacity and/or under color of legal authority, and an agency of the United States, and the plaintiff is domiciled in Western Pennsylvania.

BACKGROUND

16. Pursuant to the Levinson Act, 22 U.S.C. § 1741(a), the “Secretary of State *shall* review, *as expeditiously as possible*, the cases of United States nationals detained abroad to determine if there is *credible information* that they are being detained unlawfully or wrongfully . . .” (emphasis added).

17. To guide the Secretary’s determination as to whether there is *credible information* that a United States national has been wrongfully detained, § 1741(a) of the Levinson Act lists eleven non-exclusive considerations, of which the following eight are met in Marc Fogel’s case:

- a. § 1741(a)(2): the individual is being detained solely or substantially because he or she is a United States national;
- b. § 1741(a)(3): the individual is being detained solely or substantially to influence United States Government policy or to secure economic or political concessions from the United States Government;
- c. § 1741(a)(6): independent nongovernmental organizations or journalists have raised legitimate questions about the innocence of the detained individual;
- d. § 1741(a)(7): the United States mission in the country where the individual is being detained has received credible reports that the detention is a pretext for an illegitimate purpose;
- e. § 1741(a)(8): the individual is detained in a country where the Department of State has determined in its annual human rights reports that the judicial system

is not independent or impartial, is susceptible to corruption, or is incapable of rendering just verdicts;

- f. § 1741(a)(9): the individual is being detained in inhumane conditions;
- g. § 1741(a)(10): due process of law has been sufficiently impaired so as to render the detention arbitrary; and
- h. § 1741(a)(11): United States diplomatic engagement is likely necessary to secure the release of the detained individual.

18. Upon determining that there is credible information that a United States national has been wrongfully detained, the Secretary of State is required to, *inter alia*, expeditiously transfer responsibility for such case from the Bureau of Consular Affairs of the Department of State to SPEHA. 22 U.S.C. § 1741(b).

There is credible information that Marc Fogel is Wrongfully Detained

19. **Section 1741(a)(2):** the Russian government has detained Marc Fogel because he is a United States National.

20. Marc Fogel, a United States national, was sentenced in the Khimkinsky Court of the Moscow Region to an exorbitant fourteen years in a Russian maximum-security penal colony for possessing less than an ounce of medical marijuana.

21. Similarly, Brittney Griner, a United States national, received a nine-year sentence after being convicted on identical charges (articles 228 and 229.1) as Marc Fogel.

22. By contrast, however, the same Khimkinsky court that presided over Marc Fogel's and Brittney Griner's cases sentenced Russian national Alexander Grigoriev to ***eight years*** for contraband and possession of ***1.5 kilos*** of various narcotics in 2019,² and Dutch national Guido

² See Vesti Podmoskovya, "In Khimki, a Smuggler was Convicted of Transporting Drugs from Peru," RAMBLER NEWS (July 31, 2020), available at <https://news.rambler.ru/crime/44600171-v-himkah-osudili-kontrabandista-za-perevoz-narkotikov-iz-peru/>.

Guillermo Walters to *fifteen years* for possession of contraband and the sale of over *105 kilos* of cocaine in 2018.³

23. Upon information and belief, Russian citizens charged in cases similar to Marc Fogel's typically receive five years of probation.⁴

24. When Marc Fogel appealed his conviction, it took the appeals court approximately fifteen minutes to uphold his fourteen-year sentence despite the lengthy submission from his defense team. The appeals court did not dispute that Marc Fogel was unjustly sentenced because he is a United States national but stated that the sentencing decisions in Russian courts are not precedential and it was not bound by prior sentences given to Russian citizens.

25. **Section 1741(a)(3):** Russia has detained Marc Fogel to influence United States government policy and to obtain political concessions from the United States by seeking to close AAS Moscow and provide leverage in future prisoner exchange negotiations.

26. AAS Moscow was founded by the United States, British, and Canadian governments in 1949 and served the educational needs of children of United States diplomats and other foreign diplomats from its establishment to its closure on or around May 12, 2023.⁵

27. After his arrest, Marc Fogel learned that the Russian government had targeted AAS Moscow for political and economic reasons, including retaliation against U.S. sanctions imposed

³ See Casey, Colleagues Push to Reclassify Marc Fogel's Case as "Wrongfully Detained" (Aug. 23, 2022), available at <https://www.casey.senate.gov/news/releases/casey-colleagues-push-to-reclassify-marc-fogels-case-as-wrongfully-detained>.

⁴ See Jennifer Hansler, "Bipartisan Group of Senators Urge State Department to Designate American Teacher as 'Wrongfully Detained' in Russia," CNN (Aug. 24, 2022), available at <https://www.cnn.com/2022/08/23/politics/bipartisan-senators-letter-marc-fogel/index.html>.

⁵ See Amie Ferris-Rotman, "International School in Moscow Under Pressure Amid Visa Denials for 30 US Teachers," WASHINGTON POST (July 17, 2019), available at https://www.washingtonpost.com/world/international-school-in-moscow-under-pressure-amid-visa-denials-for-30-us-teachers/2019/07/17/00553b16-a889-11e9-9214-246e594de5d5_story.html.

in 2016, removal of non-conforming educational institutions, and the acquisition of the school's property located in the heart of Moscow.

28. Upon information and belief, the United States government knew about the Russian government's plan to remove AAS Moscow in advance of Marc Fogel's arrest but failed to warn him of potential exploitation by the Russian government.

29. Until 2019, AAS Moscow staff, including Marc Fogel, received diplomatic visas. In 2019, in an ongoing attempt to discredit and destroy AAS Moscow, the Russian government stripped AAS Moscow of its diplomatic status and denied visas to thirty teachers at the school, which the New York Times described as "an effort to exert political pressure on the United States by curtailing schooling for children of diplomats."⁶ Former United States Ambassador to Russia, Michael McFaul, whose children attended AAS Moscow, criticized these retaliatory measures.⁷

30. Before AAS Moscow was finally shut down, a Moscow court suspended the work of AAS Moscow for 90 days for a pretextual administrative violation.⁸

31. On or around June 30, 2023, the Russian Ministry of Justice declared AAS Moscow to be a Foreign Agent—a designation carrying grave consequences in Russia.⁹

⁶ See Andrew E. Kramer, "Russia Denies Visas for Teachers at Anglo-American School in Moscow," NEW YORK TIMES (July 16, 2019), available at <https://www.nytimes.com/2019/07/16/world/europe/russia-visas-diplomat-school.html>; Amie Ferris-Rotman, "International School in Moscow Under Pressure Amid Visa Denials for 30 US Teachers," WASHINGTON POST (July 17, 2019), available at https://www.washingtonpost.com/world/international-school-in-moscow-under-pressure-amid-visa-denials-for-30-us-teachers/2019/07/17/00553b16-a889-11e9-9214-246e594de5d5_story.html.

⁷ See Andrew E. Kramer, "Russia Denies Visas for Teachers at Anglo-American School in Moscow," NEW YORK TIMES (July 16, 2019), available at <https://www.nytimes.com/2019/07/16/world/europe/russia-visas-diplomat-school.html>.

⁸ See Matthew Miller, "Protesting Moscow's Designation of the Anglo-American School as a 'Foreign Agent,'" U.S. DEP'T STATE (July 5, 2023), available at <https://ru.usembassy.gov/protesting-moscows-designation-of-the-anglo-american-school-as-a-foreign-agent/>; RFE/RL's Russian Service, "Moscow Court Suspends Work of Anglo-American School Used by U.S., U.K., Canadian Embassy Families," RADIO FREE EUROPE RADIO LIBERTY (April 2, 2023), available at <https://www.rferl.org/a/moscow-court-suspends-anglo-american-school-embassies/32346094.html>.

⁹ See The Anglo-American School of Moscow, <https://www.aas.ru/> (last visited May 15, 2024).

32. Marc Fogel's arrest and conviction were part of the Russian government's political efforts to shut down AAS Moscow.

33. Based on the investigation report and verdict summary in Marc Fogel's Russian trial, he was arrested at the Sheremetyevo airport based on an informant's tip that a United States citizen, identified by the informant as Marc Fogel, might attempt to smuggle or import drugs into the Russian Federation.

34. The Russian court refused to disclose the identity of the informant and stated that the disclosure would reveal state secrets.

35. Upon information and belief, the informant was a former employee at AAS Moscow and a close friend to a high-level officer within Russia's Ministry of Foreign Affairs, as confirmed by the informant's social media posts, which include photos with the officer and references to him as his "dear friend."

36. Based on information and belief, the informant was employed by AAS Moscow from 2005 until August 2021, when he was fired shortly before Marc Fogel's arrest.

37. Following Marc Fogel's arrest, the informant contacted Marc Fogel's family and insisted on being updated on the details of his case.

38. While Marc Fogel's case was pending, the Russian Ministry of Internal Affairs alleged through its official website and through Russian state media that Marc Fogel used his diplomatic status through AAS Moscow to import and distribute drugs to Russian children.¹⁰ These claims were so outrageous and blatantly false that even the Russian prosecutors did not repeat them at trial.

¹⁰ See "Police Raided the Anglo-American School in Moscow as Part of the [F]ogel Case," INTERFAX (Jan. 27, 2022), available at <https://www.interfax.ru/amp/818717>.

39. Marc Fogel's arrest and fourteen-year sentence were also a part of Russia's efforts to detain Americans to create leverage for its exchange negotiations involving Russian nationals detained abroad.

40. The state-controlled Russian press frequently mentioned Marc Fogel as a candidate for trades involving Russians imprisoned in the United States.¹¹

41. **Section 1741(a)(6):** Independent nongovernmental organizations and journalists have raised legitimate questions about Marc Fogel's innocence, as stated in the following:

- a. Maria Lokotetskaya, "'Not Case Law,' How the Moscow Regional Court Left a Term of 14 Years to American Marc [F]ogel," BFM.RU (Aug. 25, 2022), available at <https://www.bfm.ru/amp/news/507367>;
- b. Manuel Roig-Franzia, "This American Teacher Also Sits in a Russian Jail, Worried Nobody Cares," WASHINGTON POST (July 28, 2022), available at <https://www.washingtonpost.com/lifestyle/2022/07/28/marc-fogel-teacher-russia-prison/>;
- c. Kylie Atwood, "US Asked Russia to Release American Marc Fogel on Humanitarian Grounds, His Family Says," CNN (Aug. 26, 2022), available at <https://www.cnn.com/2022/08/26/politics/marc-fogel-russia/index.html>;
- d. "'A Death Sentence': American Teacher Sentenced to 14 Years in a Penal Colony," CNN (July 26, 2022), available at <https://www.cnn.com/videos/world/2022/07/26/marc-fogel-american-teacher-detained-russia-cannabis-atwood-pkg-lead-vpx.cnn>;
- e. "US Asked Russia to Release American Marc Fogel on Humanitarian Grounds His Family Says," CBS NEWS (Aug. 27, 2022), available at <https://www.cbsnews.com/pittsburgh/news/us-asked-russia-to-release-american-marc-fogel-on-humanitarian-grounds-his-family-says/>;

¹¹ See, e.g., "'New PR Hero,' Why the United States Refused to Extradite Viktor Bout to Russia for Many Years – and Why it Agreed Now," OCCRP (Dec. 19, 2022), available at <https://www.occrp.org/ru/blog/17186-2022-12-19-17-58-39>; Maria Lokotetskaya, "'Not Case Law,' How the Moscow Regional Court Left a Term of 14 Years to American Marc [F]ogel," BFM.RU (Aug. 25, 2022), available at <https://www.bfm.ru/amp/news/507367>; "The White House Could Not Explain Why Greiner was Traded Before [F]ogel," RIA NOVOSTI (Dec. 11, 2022), available at <https://ria.ru/20221211/fogel-1837928861.html>.

- f. Zoe Strozewski, “Who is Marc Fogel? American Remains Detained in Russia as Griner Released,” *NEWSWEEK* (Dec. 8, 2022), available at <https://www.newsweek.com/who-marc-fogel-american-detained-russia-brittney-griner-1765757>;
- g. Paula Reed Ward, “Oakmont Man Detained in Russia to be Moved to Hard-Labor Penal Colony,” *TRIBLIV* (Oct. 5, 2022), available at <https://triblive.com/local/oakmont-man-detained-in-russia-to-be-moved-to-hard-labor-penal-colony/>;
- h. Peter Aitken, “Brittney Griner Trade Deal Leaves Wrongfully Detained Americans Marc Fogel, Paul Whelan in Limbo,” *FOX NEWS* (Dec. 9, 2022), available at <https://www.foxnews.com/world/brittney-griner-trade-deal-leaves-wrongfully-detained-americans-marc-fogel-paul-whelan-limbo>.

42. **Section 1741(a)(7)**: The United States mission in Russia has received credible reports that Marc Fogel’s detention is a pretext for an illegitimate purpose.

43. In addition to the above-stated facts, the United States has acknowledged Russia’s arbitrary detention of United States nationals. The United States Embassy in Russia issued a travel advisory alert on February 12, 2023, urging Americans to avoid traveling to Russia because “Russian security services have arrested U.S. citizens on spurious charges, singled out U.S. citizens in Russia for detention and harassment, denied them fair and transparent treatment, and convicted them in secret trials or without presenting credible evidence.”¹² The alert states that “U.S. citizens residing or travelling in Russia should depart immediately. Exercise increased caution due to the *risk of wrongful detentions*.”¹³ (emphasis added). This Russia Travel Advisory also appears on the Department of State’s website.¹⁴

¹² U.S. Mission Russia, “Travel Advisory: Russia – Do Not Travel,” U.S. EMBASSY & CONSULATES IN RUSSIA (Feb. 13, 2023), available at <https://ru.usembassy.gov/travel-advisory-russia-do-not-travel-february-12-2023/> (last visited May 15, 2024).

¹³ *Id.* (emphasis added).

¹⁴ “Russia Travel Advisory,” U.S. DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS (Sept. 5, 2023), available at <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/russia-travel-advisory.html> (last visited May 15, 2024).

44. Independent scholars on Russian law have characterized Marc Fogel's 14-year sentence as a form of hostage taking accomplished by Russia through the imposition of long prison sentences.

45. **Section 1741(a)(8):** Marc Fogel is detained in Russia, a country that the Department of State has determined in its annual human rights reports to have a judicial system that is not independent or impartial, is susceptible to corruption, or is incapable of rendering just verdicts.

46. The Department of State's 2021 Human Rights Report concerning Russia¹⁵ states, *inter alia*, the following:

- a. There was "widespread corruption at all levels and in all branches of government."¹⁶
- b. "[Russian] judges remained subject to influence from the executive branch, the armed forces, and other security forces, particularly in high-profile or politically sensitive cases, as well as to corruption."¹⁷
- c. There was a documented "trend of law enforcement authorities using physical force to interfere with the work of defense attorneys, including the use of violence to prevent them from being present during searches and interrogations."¹⁸
- d. "[E]xecutive interference with the judiciary and judicial corruption undermined" the right to a fair and public trial.¹⁹

47. **Section 1741(a)(9):** Marc Fogel is being detained in inhumane conditions.

48. Marc Fogel is 62 years old and has suffered from a debilitating spinal condition since the early 1990s. Over the past 30 years he has had three spinal fusions, a hip replacement,

¹⁵ Russia 2021 Human Rights Report, UNITED STATES DEPARTMENT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, available at https://www.state.gov/wp-content/uploads/2022/04/3136152_RUSSIA-2021-HUMAN-RIGHTS-REPORT.pdf.

¹⁶ *Id.* at 1.

¹⁷ *Id.* at 18.

¹⁸ *Id.* at 19.

¹⁹ *Id.*

rotator cuff surgery, and a knee surgery. On several occasions, his severe back pain would not let him straighten his back—let alone stand—and left him writhing on the floor.

49. Marc Fogel is without adequate medical care in the Russian penal colony and his debilitating pain continues to worsen.

50. During Marc Fogel’s stay at the preliminary detention centers, he was denied doctors’ visits and medical accommodations multiple times, was not provided a translator during medical visits, and was administered injections without consent and/or knowledge of what drugs were given.

51. Marc Fogel’s health further deteriorated since his transfer to the penal colony: after two-and-a-half years of incarceration, Marc Fogel has significant muscular atrophy in his leg and arm, and also suffers from neuropathy. As a result, Marc Fogel has reduced stability, and his falls result in further injuries.

52. Russian prisons are dangerous even for healthy individuals. The Department of State documented the following problems within the Russian prison system:

- a. “[O]vercrowding, poor ventilation, and inadequate health care and sanitation led to a high risk of COVID-19 infection among prisoners and detainees”;
- b. A yearly increase in the prison population mortality rate of 12 percent in 2019;
- c. Systemic physical and sexual abuse by prison guards;
- d. Prisoner-on-prisoner violence;
- e. “Potable water was sometimes rationed, and food quality was poor; many inmates relied on food provided by family or NGOs”²⁰

53. In August 2022, the BBC reported graphic descriptions of torture and abuse that occurred in 90% of Russia’s prisons between 2015 and 2019, and reported in 2021 “a prisoner

²⁰ *Id.* at 10–14.

smuggled videos out of a Russian prison, revealing some of the worst torture ever seen from Russia.”²¹

54. **Section 1741(a)(10):** Due process of law has been sufficiently impaired so as to render Marc Fogel’s detention arbitrary.

55. Marc Fogel was tried in the same court as Brittney Griner. President Biden described that court’s procedures as a “show trial” when referring to Griner’s trial.²²

56. Marc Fogel was given a 14-year sentence for possessing less than an ounce of medical marijuana when the same court sentenced Russian national Alexander Grigoriev to eight years in prison for contraband and possession of 1.5 kilos of various narcotics and Dutch national Guido Guillermo Walters to fifteen years in prison for contraband and sale of over 105 kilos of cocaine. Upon information and belief, a Russian national sentenced for the same offense as Marc Fogel’s would typically receive a lesser sentence, such as five years of probation.²³

57. The Russian court sentenced Marc Fogel to an exorbitant fourteen years in a penal colony even after finding several mitigating circumstances, such as committing crimes for the first time.

58. **Section 1741(a)(11):** United States diplomatic engagement is likely necessary to secure Marc Fogel’s release.

59. Numerous senators urged Secretary Blinken to designate Marc Fogel as Wrongfully Detained, writing, “Marc Fogel’s case warrants the same degree of political attention and

²¹ Olga Prosvirova and Oleg Boldyrev, “Ex-Inmates Reveal Details of Russia Prison Rape Scandal, BBC (Aug. 9, 2022), available at <https://www.bbc.com/news/world-europe-62465043>.

²² CBS News Special Report, “Biden addresses Brittney Griner’s release from Russia in prisoner swap,” (last visited June 9, 2024), available at <https://www.youtube.com/live/nPHICZ2QwM8?si=soiSRP8ihWwN6WDI> at 2:24.

²³ See Jennifer Hansler, “Bipartisan Group of Senators Urge State Department to Designate American Teacher as ‘Wrongfully Detained’ in Russia,” CNN (Aug. 24, 2022), available at <https://www.cnn.com/2022/08/23/politics/bipartisan-senators-letter-marc-fogel/index.html>.

diplomatic intervention [as Griner’s case].”²⁴

60. Marc Fogel is detained by the Russian Government, which is a hostile nation as to the United States, and private efforts independent of the United States Government are without the authority or means to negotiate for Marc Fogel’s release.

COUNT I – Mandamus

61. The preceding paragraphs are incorporated as if set forth fully herein.

62. Under the Levinson Act, “[t]he Secretary of State shall review, *as expeditiously as possible*, the cases of United States nationals detained abroad to determine if there is *credible information* that they are being detained unlawfully or wrongfully.” 22 U.S.C. § 1741(a) (emphasis added).

63. The Secretary of State’s determination may include consideration of eleven non-exclusive criteria, 22 U.S.C. § 1741(a)(1)–(11), eight of which are met in Marc Fogel’s case. *See* ¶¶ 19–60.

64. Secretary Blinken has not performed his required duties under 22 U.S.C. § 1741(a).

65. On or around June 27, 2023, Senator Guy Reschenthaler (R-PA) stated that “[s]ince last year, I have urged the State Department to classify [Marc Fogel] as wrongfully detained and prioritize securing his release. The Department has failed to do either and refused to explain its inaction—*effectively stonewalling my efforts to bring him home*.”²⁵ (emphasis added).

66. The *Report of the Committee on Appropriations House of Representatives together with Additional Views* (the “Committee Report”) states as follows:

²⁴ Jennifer Hansler, “Bipartisan Group of Senators Urge State Department to Designate American Teacher as ‘Wrongfully Detained’ in Russia,” CNN (Aug. 24, 2022), available at <https://www.cnn.com/2022/08/23/politics/bipartisan-senators-letter-marc-fogel/index.html>.

²⁵ “Reschenthaler, Colleagues Introduce the Marc Fogel Act,” available at <https://reschenthaler.house.gov/media/press-releases/reschenthaler-colleagues-introduce-the-marc-fogel-act>.

The Committee has serious and growing concerns regarding the status of American citizen Marc Fogel, who has been detained in Russia since August 2021. ***The Committee notes the Department of State has not been able to provide information on why Mr. Fogel has not been classified as wrongfully detained under the Robert Levinson Hostage Recovery and Hostage-Taking Accountability Act*** (subtitle A of Public Law 116-260). Not later than 60 days after the date of enactment of this Act [May 22, 2024], the Secretary of State shall submit a report to the appropriate congressional committees detailing information related to the review conducted by the Department on whether Marc Fogel is wrongfully detained. The information required shall be submitted in unclassified form but may contain a classified annex.

H.R. Rep. No. 118-146, 128–29 (emphasis added) and Related Programs Appropriations Act, 2024 (Div. F, P.L. 118-47).

67. The Department of State’s Report to Congress on Marc Fogel Report Section 7019(e) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2024 (Div. F, P.L. 118-47) and House Report 118-146 (“Report to Congress”)²⁶ does not indicate that Secretary Blinken has performed a review of Marc Fogel’s case pursuant to the Levinson Act. The Report to Congress, consisting of only two pages, failed to identify the credible information set forth above in Paragraphs 5 and 19–60. Instead, the Department of State stated that it “continues to assess Mr. Fogel’s case for indicia of wrongfulness” and “continues to closely monitor the case for evidence of discriminatory treatment due to [Marc Fogel’s] U.S. citizenship.” Exhibit A at 2. In short, the Department of State disclaims any intent to satisfy its statutory duty to act *expeditiously* in Marc Fogel’s case. *See* 22 U.S.C. § 1741(a).

68. Under the Levinson Act, Marc Fogel’s designation as Wrongfully Detained entitles his 95-year-old mother, Malphine Fogel to information concerning United States policy, including contact information for officials in the Department of State to answer questions, legal resources,

²⁶ The Report to Congress is attached as Exhibit A to the Complaint.

and travel to and from Washington, D.C. 22 U.S.C. §§ 1741(d). Furthermore, SPEHA's Family Engagement Coordinator would, *inter alia*, coordinate Malphine Fogel's interaction with executive branch officials and provide her with consistent and accurate information from the United States Government. 22 U.S.C. § 1741a(d)(1).

69. Plaintiff requests that the Secretary of State be ordered to perform his required duty set forth in 22 U.S.C. § 1741(a), which consist of reviewing Marc Fogel's case and determining if there is ***credible information*** that he has been Wrongfully Detained.

70. Plaintiff request that if the Secretary of State reaches a negative determination, that Plaintiff be afforded an opportunity to contest the determination consistent with her due process rights guaranteed under the United States Constitution and the Administrative Procedure Act.

COUNT II – Equal Protection

71. The preceding paragraphs are incorporated as if set forth fully herein.

72. Brittney Griner, a Black female, was 31 years old when she was arrested at the Sheremetyevo International Airport, and subsequently charged and convicted under the same Articles of the Russian Criminal Code as Marc Fogel. Brittney Griner is married to Cherelle Griner, a female, and was at the time of her arrest. Upon information and belief, Brittney Griner's family members are African American.

73. Marc Fogel, a white male, was 60 years old when he was arrested at the Sheremetyevo International Airport and subsequently charged and convicted under the same Articles of the Russian Criminal Code as Brittney Griner. Marc Fogel is married to Jane Fogel, a female, and was at the time of his arrest. Marc Fogel's family members are white.

74. On or around May 3, 2022, Secretary Blinken designated Brittney Griner as Wrongfully Detained under the Levinson Act, which led to her case being transferred to SPEHA. Subsequently, she was returned to the United States in exchange for Viktor Bout, a Russian arms

dealer known as the “Merchant of Death.”²⁷

75. As a result of being designated as Wrongfully Detained, Brittney Griner’s family members were entitled to the benefits afforded to them under the Levinson Act.

76. Other United States nationals who were not also citizens of Russia have been detained in Russia and designated as Wrongfully Detained, such as Evan Gershkovich.

77. Family members of those United States nationals are entitled to the benefits afforded to them under the Levinson Act.

78. Acting under the color of legal authority, Secretary Blinken has refused to perform his duties under the Levinson Act as to Marc Fogel’s case.

79. Secretary Blinken’s inaction has precluded Marc Fogel’s designation as Wrongfully Detained and, *inter alia*, has precluded his family from receiving those benefits afforded to them under the Levinson Act.

80. Unlike Brittney Griner and other United States nationals detained in Russia, Secretary Blinken has intentionally excluded Marc Fogel and his family from the protections afforded under to them the Levinson Act without articulating a compelling governmental interest, important governmental interest, and/or rational basis for doing so.

81. For years, the Department of State has actively deterred Marc Fogel’s family members from pursuing a Wrongfully Detained designation.

82. Plaintiff proceeds on her equal protection claim based on membership of a protected class and as a class of one.

COUNT III – Procedural Due Process

83. The preceding paragraphs are incorporated as if set forth fully herein.

²⁷ “Viktor Bout: Who is the Merchant of Death?” BBC (Dec. 8, 2022), available at <https://www.bbc.com/news/world-europe-11036569>.

84. Secretary Blinken deprived Marc Fogel and his family members of the benefits of the Levinson Act by not designating Marc Fogel as Wrongfully Detained.

85. Secretary Blinken has failed to disclose to Marc Fogel or his family members any valid reason for not designating him as Wrongfully Detained under the Levinson Act. In doing so, Secretary Blinken has precluded any opportunity for Marc Fogel or his family members to exercise their due process rights guaranteed under the United States Constitution.

86. As a result of Secretary Blinken not designating Marc Fogel as Wrongfully Detained, his family members have been deprived of any benefits afforded to them under the Levinson Act while Marc Fogel has remained incarcerated in a maximum-security Russian penal colony.

87. By failing to designate Marc Fogel as Wrongfully Detained, Secretary Blinken has delayed Marc Fogel's unjust incarceration in Russia and deprived his family of, *inter alia*, any information known to the United States concerning Marc Fogel's incarceration and/or efforts, if any, being made for his release.

88. Marc Fogel's family members have been denied procedural due process in connection with Secretary Blinken's failure to designate Marc Fogel as Wrongfully Detained.

COUNT IV – Violations of the Administrative Procedure Act (“APA”)

89. The preceding paragraphs are incorporated as if set forth fully herein.

90. Count IV for violations of the APA is asserted in the alternative to Count I (Mandamus).

91. The action, findings, and conclusions of the Secretary of State and/or the Department of State must be set aside when, *inter alia*, found to be arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with the law; contrary to a constitutional right; or without observance of procedure required by law. 5 U.S.C. § 706(2).

92. The Secretary of State's and/or the Department of State's determination that Marc Fogel is not Wrongfully Detained is a final agency action, finding, or conclusion.

93. The Secretary of State and/or the Department of State have failed to provide any explanation for their actions, findings and/or conclusions.

94. There is no rational connection between the facts and the Secretary of State's and/or the Department of State's determination that Marc Fogel is not Wrongfully Detained.

95. The Secretary of State and/or the Department of State have not considered relevant facts and/or credible information in connection with Marc Fogel's case. In its Report to Congress, the Department of State failed to acknowledge any of the credible information set forth above in Paragraphs 5 and 19–60. *See* Exhibit A.

96. Further, the Report to Congress misstates facts and asserts unsupported conclusory statements that contradict known facts. By way of example,

- a. The Report to Congress issued on or after May 22, 2024, states, “Mr. Fogel currently has a third appeal pending with the Russian Supreme Court.” Exhibit A at 1. In fact, Marc Fogel's appeal to the Russian Supreme Court was denied on or around April 22, 2024, at least one month before the Report to Congress was issued.
- b. The Report to Congress states the unsupported conclusions that “[l]ong sentences for drug smuggling are common under Russia's drug laws. . . . Mr. Fogel's sentence was not unprecedented compared to both Russian and foreign nationals recently detained in Russia” Exhibit A at 2. To the contrary, a Russian appellate court agreed with Marc Fogel's Russian attorneys that his sentence was only given to professional drug smugglers and not in cases such as Marc Fogel's.²⁸ Brittney Griner's Russian attorneys stated that her sentence of nine years contradicts all known jurisprudence.²⁹
- c. The Report states that Marc Fogel “was convicted under Article 228.2” and “pleaded guilty to the charges ‘with intent to break the law.’” Exhibit A at 1. In

²⁸ *See* Maria Lokotetskaya, “‘Not Case Law,’ How the Moscow Regional Court Left a Term of 14 Years to American Marc [F]ogel,” BFM.RU (Aug. 25, 2022), available at <https://www.bfm.ru/amp/news/507367>.

²⁹ *See* “Мособлсуд не стал смягчать приговор американке Бриттни Грайнер...” EURONEWS IN RUSSIAN, available at <https://youtu.be/Y9lvC394ILw?si=eVQ7EKjYc81GPERK> at 0:21 (last visited June 6, 2024).

fact, Marc Fogel pleaded guilty to Article 228 of the Russian Criminal Code, not Article 228.2. Unlike Article 228.2, Article 228 contains no intent provision, and Marc Fogel never pleaded or testified that he acted with intent to break the law.

97. The misrepresentations in the Report to Congress indicate, *inter alia*, a failure to review Marc Fogel's case pursuant to the Levinson Act and consistent with the Department of State's obligations under the APA. They also call into question the Department of State's assurances that it will continue "*to assess Mr. Fogel's case* for indicia of wrongfulness" and "*closely monitor the case* for evidence of discriminatory treatment due to [Marc Fogel's] U.S. citizenship. Exhibit A at 2 (emphasis added).

98. The Secretary of State and/or the Department of State has failed to provide any explanation or legitimate reason for treating a similar case (i.e. Brittney Griner) differently than Marc Fogel's case.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court enter an order directing Secretary Blinken to perform his review required under § 1741(a) of the Levinson Act and, in the event of a negative determination, allow Plaintiff an opportunity to exercise her due process rights, which would include, at a minimum, providing Plaintiff with (i) notice of the necessary findings of facts and conclusions of law upon which the Secretary relied in making his determination, (ii) an opportunity to review the Secretary's findings and conclusions, and (iii) submit additional arguments and evidence for further review.

Plaintiff further requests that this Court enter judgment against Defendants as to Plaintiff's Equal Protection (Count II) and procedural due process (Count III) claims. Plaintiff seeks any and all damages as the Court may deem appropriate.

Plaintiff respectfully requests that the Court set aside a finding that Marc Fogel is not Wrongfully Detained as violating the APA.

Lastly, Plaintiff respectfully requests all other relief as the Court deems just and proper.

DEMAND FOR TRIAL BY JURY

Plaintiff respectfully demands a trial by jury as to all claims and issues of fact.

Respectfully submitted,

By: /s/ Edward D. Phillips
Edward D. Phillips, Esquire
Pa. I.D. #322402
Joseph V. Schaeffer, Esquire
Pa. I.D. #323256

Babst, Calland, Clements & Zomnir, P.C.
Two Gateway Center, 6th Floor
Pittsburgh, PA 15222
Phone: 412-394-5400
ephillips@babstcalland.com
jschaeffer@babstcalland.com
Counsel for Plaintiff Malphine Fogel